Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

VIPIN TRIVEDI,

Petitioner,

vs.

THOMAS COOPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER PRECLUDING PETITIONER FROM APPEALING FROM A REMITTITUR BECAUSE HE DID NOT AGREE TO A NEW TRIAL VIOLATES HIS SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY AND IS CONTRARY TO THE PRINCIPLE THAT THE HIGH COSTS OF LITIGATION SHOULD NOT DETER CIVIL RIGHTS PLAINTIFFS FROM LITIGATING EXPENSIVE EMPLOYMENT DISPUTES?

2. WHETHER PRECLUDING PETITIONER FROM APPEALING FROM A REMITTITUR BECAUSE HE DID NOT AGREE TO A NEW TRIAL CONTRADICTS 28 U.S.C. sec. 1291, WHICH CONFERS APPELLATE JURISDICTION OVER ALL FINAL DISTRICT COURT ORDERS?

LIST OF PARTIES

The New York State Office of Mental Health was a named defendant. Prior to trial, that defendant was dismissed from the case on the ground that the Eleventh Amendment barred suit against it. All other parties in the court below are listed in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss the appeal for lack of appellate jurisdiction.

DECISION BELOW

The order of the United States Court of Appeals for the Second Circuit granting respondent's motion to dismiss is reproduced in the appendix ("Pet.App.") at A-1. The underlying opinion of the Southern District of New York is unreported and is reproduced at Pet.App. 2.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was rendered and judgment entered on April 15, 1997. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution reads as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

28 U.S.C. sec. 1291 reads:

> "The courts of appeals (other than United States Court of Appeals for the Federal Circuit) shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

STATEMENT OF THE CASE

Petitioner, Vipin Trivedi, commenced this action pursuant to 42 U.S.C. secs. 1981 and 1983 against respondent, Thomas Cooper, claiming a racially hostile work environment, failure to promote and retaliation for seeking legal advice about the racial discrimination to which he was subjected.

The jury trial lasted from October 7-16, 1996 before Hon. Denise L. Cote of the United States District Court, Southern District of New York. The jury rendered a verdict for petitioner on all three claims and awarded him compensatory damages for pain and suffering of $700,000. The district court determined that petitioner was not entitled to back pay and the jury did not award punitive damages.

At trial, petitioner introduced the following evidence:

Over a period of five years, respondent assigned petitioner, a research scientist, menial tasks in the laboratory, prevented him from collaborating with other researchers, did not give him work that would lead to publication, prevented him from attending professional seminars and conferences and barred him from using the computer. Also, in the Spring of 1994, respondent refused on four occasions to sponsor petitioner for a promotion. That sponsorship was a necessary prerequisite to promotion. In two of these conversations, respondent ridiculed his request by calling petitioner a "brown nigger." Indeed, from 1986 onward, petitioner frequently directed racial slurs to petitioner. Petitioner also showed that respondent had retaliated against him for seeking legal assistance to redress his discrimination claims by giving him a poor evaluation in 1993 and 1994. Pet.App. 4-5.

In an opinion dated December 16, 1996, the district court denied respondent's motion to set aside the verdict. The district court ruled that respondent had waived his right to challenge the hostile work environment verdict. The district court also held that petitioner had proffered evidence sufficient to support the jury verdict that respondent had illegally retaliated against him and subjected him to disparate treatment on account of his national origin. Pet.App. 7-8, 9-10, 11.

However, the district court remitted the compensatory damage award of $700,000 on the hostile work environment claim to $50,000. The court held that $50,000 was a generous award, did not shock the conscience and was consistent with other cases. The court gave petitioner a choice: either accept

the remittitur or re-try the case again on all issues. Petitioner accepted the remittitur. Pet.App. 21.

On or about January 30, 1997, petitioner "notice[d] his intention to appeal from each and every aspect of the . . . CIVIL JUDGMENT (filed January 6, 1997) and OPINION AND ORDER (dated December 16, 1996) that remitted plaintiff's $700,000 jury award to $50,000." Pet.App. at 23.

On or about March 17, 1997, respondent filed a motion to dismiss the appeal for want of jurisdiction. Respondent argued that petitioner waived his right to appeal by accepting the remittitur. The Second Circuit granted the motion on April 15, 1997. Pet.App. 1.

REASONS FOR GRANTING THE WRIT

The Second Circuit improperly granted respondent's motion to dismiss this appeal for want of jurisdiction. While respondent argued that petitioner could not appeal from his acceptance of a remittitur in lieu of a new trial on liability and damages, petitioner argued that precluding him from appealing the remittitur on the ground that he did not agree to a new trial is illogical, unconstitutional and violates the principle that the high costs of litigation should not deter civil rights plaintiffs from litigating expensive employment disputes in federal court. The district court gave petitioner a Hobson's Choice: accept the remittitur or re-try the case. Since the district court had already set a damage cap in the amount of $50,000 in this case, trying the case again would have been a futile exercise because, predictably, the district court would again have reduced any damage award in excess of that amount. In light of the high costs of litigating employment discrimination cases (this case was tried over the course of seven days), re-trying the case is not financially possible for out-of-work plaintiffs like petitioner. And, by requiring plaintiffs to either accept remittitur or re-try the case, controlling law violates 28 U.S.C. sec. 1291, which allows litigants to appeal final orders.

Certiorari is proper to resolve whether plaintiffs should be precluded from appealing a remittitur in lieu of re-trying the case, particularly where, as here, civil rights plaintiffs depend on the fee shifting statute to recover costs and cannot afford to return to court. *See*, Sup.Ct. Rule 10(c).

ARGUMENT

POINT I

THIS COURT SHOULD OVERRULE ITS PRECEDENTS REQUIRING PLAINTIFFS TO EITHER ACCEPT REMITTITURS OR RE-TRY THE CASE AS THESE CHOICES STRIP THE JURY OF ITS AUTHORITY AND UNDULY BURDEN CIVIL RIGHTS PLAINTIFFS WHO CANNOT AFFORD TO TRY THE CASE AGAIN

Certiorari is proper to review an order that decides an important question of federal law that this Court should settle. Sup.Ct. Rule 10(c).

As the Federal civil rights statutes forming the basis of petitioner's suit — 42 U.S.C. secs. 1981 and 1983 — offer discrimination victims monetary relief for pain and suffering as opposed to merely equitable remedies, the Seventh Amendment guarantees them a trial by jury. *See*, *Curtis v. Loether*, 415 U.S. 189, 194 (1974) ("the Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law").

By requiring petitioner to (1) re-try the case or (2) accept the remittitur, the district court gave him a Hobson's choice that strikes at the heart of a civil rights plaintiff's effort to seek relief from a jury and appeal from an erroneous district court judgment. Pursuing the first choice would have been futile since the district court had already predetermined the worth of petitioner's claim and, logically, could be expected to reduce any subsequent jury award to $50,000. Trying the case again would deprive petitioner of his Seventh

Amendment right to trial by jury because the court, not the jury, had already set the damage cap. The second choice does not benefit petitioner, either, because it significantly understates the value of his case in light of the jury's award of $700,000 to compensate him for the hostile work environment. And, contrary to 28 U.S.C. sec. 1291, which authorizes appeals from final district court orders, "accepting" the remittitur in lieu of a new trial effectively forecloses petitioner from appealing the district court's order and challenging its rationale for reducing the damages.

Petitioner acknowledges this Court's authority that successful plaintiffs must either agree to a new trial or accept a remittitur. However, these cases only address the plaintiff's waiver or consent to the conditional new trial and do not speak to the undue burdens such "consent" places on plaintiffs -- particularly those pleading civil rights claims -- who cannot afford the expense of another trial and, instead, like petitioner, rely on the fee-shifting statute, 42 U.S.C. sec. 1988, to cover their expenses if they prevail. *See, e.g., Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977); *Kennon v. Gilmer*, 131 U.S. 22 (1889); *Woodworth v. Chesbrough*, 244 U.S. 79 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895).

By effectively precluding appeals from the acceptance of a remittitur, this Court's precedents make irrelevant the Second Circuit's instructions as to the parameters of proper remittitur orders, that is, awards may be reduced but only to the reasonable range as measured by awards in like cases. *See, Lee v. Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (*citing Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990)). Under current law, petitioner is not permitted to challenge as clearly erroneous the district court's judgment reducing the $700,000 jury award to $50,000 even though nearly every other district court final judgment is appealable under 28 U.S.C. sec. 1291.[1]

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[1] Petitioner is prepared to argue that the remittitur is significantly below the reasonable range of acceptable damage awards compensating civil

(Footnote continued)

Simply put, controlling precedent is illogical and does not address whether a plaintiff's forced acceptance of remittitur in lieu of a new trial constitutes no consent at all and violates (1) the right to a jury trial as guaranteed by the Seventh Amendment, (2) the right to appeal a final judgment and (3) long-held principles intended to encourage employment discrimination plaintiffs to litigate their disputes despite the high costs

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rights plaintiffs for pain and suffering sustained, as here, during at least five years of oppressive conduct by supervisory personnel. A string of state appellate decisions, some of the reviewing damage awards assessed by the New York State Division of Human Rights -- clearly an authority on the value of discrimination cases -- makes clear that $50,000 is far below the reasonable range of acceptable damage awards. *See, McIntosh v. Irving Trust Co.*, 887 F.Supp. 662, 667 (S.D.N.Y. 1995) ("the standards of review with respect to Human Rights Division awards and jury verdicts are not so different as to make the Human Rights cases inapposite") (*citing, New York City Transit Authority v. State Division of Human Rights*, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991); *Town of Hempstead v. State Division of Human Rights*, 649 N.Y.S.2d 942 (2nd Dept. 1996) (awards ranging from $200,000 to $500,000 which were made to compensate six complainants suffering psychological injuries from a hostile work environment in violation of State Human Rights Law was neither arbitrary nor capricious); *Allender v. Mercado*, 649 N.Y.S.2d 144 (1st Dept. 1996) (in discriminatory termination case filed pursuant to State Human Rights Law, "[t]he award of $100,000 for mental anguish is not excessive in comparison to awards for similar injuries") (citations omitted); *Boutique Industries, Inc. v. New York State Division of Human Rights*, 643 N.Y.S.2d 986 (1st Dept. 1996) (compensatory damages in the amount of $100,000 was proper in discrimination and retaliation case); *Tiffany & Co. v. Smith*, 638 N.Y.S.2d 454 (1st Dept. 1996) (constant, egregious and blatant discriminatory conduct warranted $300,000 for mental anguish and compensatory damages) (citations omitted); *New York City Transit Authority v. State Division of Human Rights*, 181 A.D.2d 891, 581 N.Y.S.2d 426 (2d Dept. 1992) (award of $450,000 to compensate bus driver for mental anguish caused by severe and intentional sex discrimination over a prolonged period of time was not excessive); *Sogg v. American Airlines*, 193 A.D.2d 153, 603 N.Y.S.2d 21 (1st Dept. 1993) ($400,000 in compensatory damages for discrimination based on the plaintiff's sex, age and disability was proper). These cases establish that Judge Cote's decision to remit the jury's damage award to $50,000 significantly undervalued petitioner's case and constituted an abuse of discretion.

of litigation. As noted, the district court has already established the limit for petitioner's damages; trying the case again would result in the same award if the jury exceeded what the court has clearly set for using its now unbridled authority to assess and award damages. The burden that controlling law places on out-of-work civil rights plaintiffs like Trivedi is compounded by its circular (and illogical) effect: if the plaintiff continues to accept a new trial rather than the district court's remittitur, when does the process end and how can he afford to continue litigating against the state with its unlimited resources?

As 42 U.S.C. sec. 1988 articulates a national policy that the high costs of litigation should not deter civil rights plaintiffs from legally challenging discriminatory work conditions and practices, this Court should (1) overrule the precedents that prohibit appeals following remittitur and (2) permit petitioner to appeal the district court's decision and demonstrate to the Court of Appeals that the remittitur substantially undervalued his case and trammeled upon the jury's discretion to assess and award damages.

POINT II

THE RULE AGAINST APPEALING FROM A REMITTITUR IGNORES THE PRINCIPLE THAT THE CIRCUIT COURT HAS JURISDICTION TO HEAR FINAL ORDERS OF THE DISTRICT COURT

The rule that plaintiffs cannot challenge a district court's remittitur violates the most basic principle governing appeals: circuit courts have jurisdiction over all final decisions of the district court. 28 U.S.C. sec. 1291. Certiorari is proper to settle this issue of law that conflicts with federal appellate principles. *See*, Sup.Ct. Rule 10.

Section 1291 speaks in absolute terms: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district court of the United States[.]" This

statute contemplates that no final district court order shall be unreviewable.

The only exception to section 1291's instruction that the circuit courts may review all final district court orders is the rule that led to the dismissal of petitioner's appeal: plaintiffs cannot appeal from a remittitur no matter how erroneous. Indeed, this Court has not eliminated circuit court jurisdiction over challenges to credibility determinations despite noting that "when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 576 (1985).

This case highlights the drastic and illogical results stemming from the bright line rule barring appeals from remittiturs. Consistent with its historic role to find facts, including the worth of a plaintiff's claims, the jury found for petitioner on his First Amendment, retaliation and hostile work environment claims and valued his case at $700,000. On a post-trial motion, the district court "corrected" the jury and remitted the damage award to $50,000. As discussed *supra*, petitioner is prepared to demonstrate that the district court abused its discretion by drastically remitting the damage award far below the reasonable range for employment discrimination cases. However, controlling law precludes petitioner from challenging the erroneous remittitur on appeal. This niche of unreviewability is incongruous and inconsistent with the proper respect due to juries. To the extent this Court's precedent bars petitioner from appealing from the district court's erroneous order drastically reducing the damage award, those cases should be overruled consistent with section 1291's absolute right to appeal from final district court orders.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be

Dated: June ___,1997
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Respectfully submitted,

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